**CHUAH TONG YEONG**

**v.**

**KUALA LUMPUR GOLF & COUNTRY CLUB BHD**

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL WAHAB PATAIL J
[SUIT NO: S3-22-485-1998]
8 MAY 2003

***CONTRACT:*** *Misrepresentation - Failure to provide club facilities as depicted in brochure - Whether plaintiff induced by misrepresentation - Whether real loss or damages proven - Whether plaintiff suffered hardship caused by the misrepresentations - Whether misrepresentations considered to be major and serious - Whether suitable case to warrant an order of rescission*

The defendant was a developer of and managed a golf and country club known as Kuala Lumpur Golf and Country Club ('the Club'). The Club had issued a brochure, featuring facilities such as a library, health center, 100 covered car parks, 500 open car parks, four tennis courts and a practice court. The plaintiff had applied to become a member of the club and had paid a down payment of RM15,000. Subsequently, the plaintiff lodged a written complaint to the defendant regarding the non-existence of certain above said facilities. Contending misrepresentation by the Club, the plaintiff sought for a declaration that the agreement for the purchase of membership be annulled and for recovery of damages.

**Held:**

**[1]** The managing director of the Club testified that a reading room with seating for 10 and supplied with newspapers, magazines and some books on golf was provided. The fact that the managing director himself described it as a reading room was sufficient to prove that the Club had breached its representation to provide a library. However, no real loss or damage was proven so as to provide basis for consideration for any order on this ground. (p 184 c-e)

**[2]** The plaintiff's complaint was that the Club failed to provide an integrated facility of gymnasium and health center when what was provided was only a partial massage facility and a gymnasium. But, there was a certain vagueness as to the meaning of the term 'health centre'. Thus, on this ground of a lack of definition, the plaintiff's complaint failed. (p 184 f-g)

**[3]** Regarding the tennis courts which were not provided, the defendant asserted these facilities will be provided at a different location and not as presented in the brochure. There was no time frame stated for the provision and completion of these facilities. In fact, there was a qualification that the list of facilities are accurate as at time of the statement. The prospectus of March 1993 stated that expected dates of completion are tentative. There was also no evidence that there was a lack of diligence on the part of the defendant in obtaining the approvals from DBKL. It was clear that the probable cause of delay arose from delays in approval from DBKL if the facility was to be built near the original location. The Club now intends to build the facilities elsewhere that does not require DBKL's approval. The plaintiff did not state whether the location of the tennis courts was one of his major interests at the time he applied for membership. In the circumstances, the court could not place much weight on this objection. (pp 184 h & 185 a-e)

**[4]** It was not disputed that 100 covered car parks were not provided and that the number of open car parks provided was 100 less than represented. But real loss to the plaintiff was not shown. There was no evidence that it was a condition of his purchase that he would be provided with a covered car park. There was no evidence that, as a result of the 100 less open car parks, the plaintiff would suffer. The court did not consider this failure as being material. (p 185 f-g)

**[5]** The misrepresentations were not matters of major or decisive consideration in the plaintiff's decision to purchase the club membership so as to warrant an order of rescission, but it would warrant an order of compensation by way of damages, if any. (p 185 h)

*[Order accordingly.]*

**Case(s) referred to:**

*Abdul Razak Datuk Abu Samah v. Shah Alam Properties Sdn Bhd & Anor [1999] 3 CLJ 231 CA* ***(refd)***

*Letchemy Arumugam v. N Annamalay [1982] 2 MLJ 198 HC* ***(refd)***

*Low Kon Fatt v. Port Klang Golf Resort (M) Sdn Bhd [1998] 3 CLJ Supp 301 HC* ***(refd)***

*For the plaintiff - Rimi Abdul Rahman; M/s CK Leong & Nurbayua*
*For the defendant - Robert Lazar; M/s Shearn Delamore & Co*

*Reported by Suhainah Wahiduddin*

## JUDGMENT

**Abdul Wahab Patail J:**

**The Agreed Facts**

The defendant is a company with a business address at No. 10. Jalan 1/70D Off Jalan Bukit Kiara, 60000 Kuala Lumpur. The defendant is a developer of and manages a golf and country club known as Kuala Lumpur Golf and Country Club ("the club").

The Club has issued a brochure (as referred to at p. 332-350 of agreed bundle of document (s. 1)). Facilities and features of the club as listed in the said brochure included *inter alia*, library, health centre, 100 covered car parks, 500 open car parks, 4 tennis courts and a practice court.

At the material time, the club had also issued a Prospectus (as referred to at p. 360 of agreed bundle of document (s. 1)). Facilities and features of the club as stated in the said prospectus shall include *inter alia,* library, health centre, 100 covered car parks, 500 open car parks, 4 tennis courts and a practice court.

The plaintiff had applied to become a member of the club by filling up an application form provided by the club (as referred to at p. 28-30 of agreed bundle of document (s. 1)).

The defendant has on 9 August 1993 accepted the plaintiff's application to become a member of the club (as referred to at p. 29 of agreed bundle of document (s. 1)).

The purchase value of Individual License Certificate (membership) of the club applied by the plaintiff is RM90,000. The plaintiff has paid a down payment of RM15,000 when submitting the application form to the club. The balance of RM75,000 was paid to the club by way of a fixed loan obtained by plaintiff from D & C Bank.

The club has issued statements under s. 90 of the Companies Act 1965 dated:

(i) 18 March 1993 (as referred to at p. 1-27 of agreed bundle of document (s. 1));

(ii) 30 September 1993 (p. 38-91 of agreed bundle of document (s. 1));

(iii) 14 April 1994 (p. 113-160 of agreed bundle of document (s. 1));

(iv) 6 May 1997 (p. 164-237 of agreed bundle of document (s. 1)); and

(v) 13 April 2002 (p. 246-359 of agreed bundle of document (s. 1))

which were circulated to all club members providing a detailed account of the club's state of finance, facilities and development progress.

To date, 100 covered car parks, 4 tennis courts and a practice court have not been constructed at the club.

The plaintiff had lodged a written complaint to the defendant regarding the non-existence of the above-said facilities in his letter dated 4 April 1997 (as referred to at p. 163 of agreed bundle of document (s. 1)).

The club has a gymnasium with shower, changing rooms and sauna facilities and 440 open car parks.

By this action plaintiff seeks orders as follows:

(i) A declaration that the agreement for the purchase of membership be annulled;

(ii) Return of RM90,000; or alternatively

(iii) Damages;

(iv) Interest; and

(v) Costs.

His complaint is based upon misrepresentation as follows:

(i) LIBRARY: the brochure and prospectus represented that there will be a library, but no library is provided.

(ii) HEALTH CENTRE: the brochure represented that there will be a gymnasium and a health centre but only a gymnasium and a massage facility was provided.

(iii) CAR PARKS: the brochure represented there will be 110 covered car parks and 500 open car parks.

(iv) TENNIS AND A PRACTICE COURT: the brochure represented there will be four tennis courts and one practice court between the driving range and the clubhouse, but none was provided.

It is trite law that for such action in misrepresentation to succeed it must be shown there was 1) a representation; 2) the plaintiff was induced by it; 3) the representation is untrue; and 4) it is a suitable case for recission. To recover damages, loss must be proven: *Letchemy Arumugan v. N. Annamalay* [1982] 2 MLJ 198. If the representation was merely innocent, the affected party is entitled only to a recission: *Abdul Razak bin Datuk Abu Samah v. Shah Alam Properties Sdn Bhd & Anor* [1999] 3 CLJ 231 CA. It is equally trite that mere exaggeration is not representation, but if it has the object and result of inducing an affected party, it is a representation: *Low Kon Fatt v. Port Klang Golf Resort (M) Sdn Bhd* [1998] 3 CLJ 301.

**Library**

The Managing Director of the defendant club testified that a reading room with seating for 10 and supplied with newspapers, magazines and some books on golf were provided. I find it telling that the Managing Director himself described it as a reading room. A premier golf and country club with facilities for the family, as the club purports to be in its brochure and prospectus, be said to have complied with its representation for a library by providing library facilities only for the golfers, and leaving the family to newspapers only.

I found, therefore, that the defendant had breached its representation to provide a library. However, no real loss or damage was proven so as to provide the basis for consideration for any order on this ground.

**Health Centre**

The defendant's submission drew difference between health centre and health club relying upon the New Shorter English Dictionary. Clearly a gymnasium was considered not a health centre in this case because the health centre was stated separately from a gymnasium. The plaintiff's complaint is the failure to provide an integrated facility of gymnasium and health centre. What are provided are a partial massage facility and a gymnasium.

But there is certain vagueness as to the meaning of the term "health centre". The plaintiff's complaint on this ground of a lack of definition as to the meaning of a health centre must, therefore, fail.

**Tennis And Tennis Practice Courts**

It is accepted tennis and tennis practice courts have not been provided. But the defendant asserts these facilities will be provided, but at a different location and not at the location as in the brochure.

The brochure states these facilities are located between the driving range and the clubhouse. There is no time frame stated for the provision and completion of these facilities. In fact, there is a qualification that list of facilities are accurate as at time of the statement. The prospectus of March 1993 states that expected dates of completion are tentative. But "and may be subject to changes" in the context used refers to changes in the expected date of completion and the club only promised best efforts to comply but shall not be liable for delay. The inference must be it will be provided within a reasonable time. There is no representation that the building approvals had in fact been obtained.

There is also no evidence there is a lack of diligence on the part of the defendant in obtaining the approvals from DBKL. It is clear the probable cause of delay arises from delays in approval from DBKL if the facility is to be built near the original location as that part included resort homes, commercial complexes, multi-purpose centre, and a sports complex, which necessitated DBKL's approval. In fact, DW1 said the defendant intended to build the facilities elsewhere that does not require DBKL's approval.

Given that there is a change in plans, the next question to consider is how this affects the plaintiff. The plaintiff did not state the location of the tennis and tennis practice courts was the, or was one of his major interests at time he filled his application form. In the circumstances, I would not place much weight on this objection.

**Car Parks**

It is not disputed the 110 covered car parks was not provided. Clear DW1 said there would be no covered car parks. It is also not disputed that the number of open car parks provided is 100 less than represented. On the face of it the objection is borne out by the facts.

But real loss to the plaintiff is not shown. There is no evidence it is a condition of his purchase that he would be provided with a covered car park. There is no evidence that, as a result of the 100 less open car parks, the plaintiff would suffer not having a car park. I would not, therefore, consider the failure to provide covered car parks as being material.

**Conclusion**

While the complaints are in part borne out, and are grounds for grievance, I do not consider the misrepresentations to be matters of major or decisive consideration to the plaintiff in his purchase decision as to warrant an order of rescission, but would warrant an order for compensation by way of damages, if any.